No. 15588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES W. HOFFRITZ,

Petitioner,

vs.

THE HONORABLE HARRY C. WESTOVER and THE HONORABLE WILLIAM MATHES, Judges of the United States District Court for the Southern District of California, Central Division; and THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION,

Respondents.

Response of Respondent Court and Judges to Petition for Writ of Mandamus, Injunction, and Other Appropriate Relief, and for Rule to Show Cause and Brief.

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Respondents.

Response of Respondent Court and Judges to Petition for Writ of Mandamus, Injunction, and Other Appropriate Relief, and for Rule to Show Cause.

---

(1) I, William C. Mathes, a Judge of the United States District Court for the Southern District of California, on behalf of the United States District Court for the Southern District of California, and on behalf of myself as a Judge thereof, in compliance with the rule here issued out of this Court on the 19th day of June, 1957, directing me and the Honorable Harry C. Westover, and the United States District Court for the Southern District of California, Central Division, to show cause

why the writ of mandamus, injunction, and other appropriate relief should not be granted in accordance with the prayer of the petition filed herein, do hereby certify and make the following response to this Court.

(2) The writ of mandamus, injunction, and other appropriate relief sought by the petition herein should be denied because of the facts disclosed by the record in this case and for the facts and reasons hereinafter set forth:

(3) Respondent has fully and completely complied with the mandate of this court, as referred to in the petition on file herein, as he understands and interprets such mandate, namely, the mandate filed, docketed and entered in the United States District Court for the Southern District of California, Central Division, on January 29, 1957, which mandate incorporates and directs, in conformity with the opinion of this Court, namely, the case of *Charles W. Hoffritz v. United States of America, et al.*, as reported in 240 F. 2d 109 (C. A. 9), December 20, 1956, and which opinion and mandate contains the following order to wit:

> "The judgment is reversed and the cause remanded, with directions to grant appellant a hearing at which he may produce evidence and cross-examine adverse witnesses. An appropriate order shall be entered in the district court enjoining further proceedings in the criminal action until such a hearing has been held in the instant proceedings, and there has been a complete disposition thereof."

(4) Your respondent respectfully submits that the language of such mandate enjoined further proceedings in the criminal action, namely, that certain action of *United States v. Charles W. Hoffritz,* No. 24427-CD, until a

hearing be had in the civil proceedings, namely, a hearing to be had in the civil proceedings of *Charles W. Hoffritz v. United States, et al.,* No. 17721-WM.

(5) That, subsequent to the spreading of the mandate in the District Court, a full and complete hearing was accorded to the plaintiff, Charles W. Hoffritz. Said hearing having been held before respondent, United States District Judge William C. Mathes on February 14 and 15, 1957, at which time and place witnesses were produced on behalf of the plaintiff and likewise on behalf of the defendant and evidence was received both oral and written, exhibits were introduced into evidence, written briefs were filed and oral arguments were presented on behalf of both the plaintiff and defendant in said civil action.

(6) That your respondent, as a United States District Judge, following such hearing, and on February 27, 1957, signed the Findings of Fact, Conclusions of Law, and Judgment. The same, to my understanding, are to be incorporated in a brief to be filed in conjunction with this response and are to be marked as Exhibit "A" thereto.

(7) That, in accordance with your respondent's understanding of the language used in the mandate of this Court, above referred to, such hearing constituted a complete and full compliance therewith and a complete disposition thereof. This Court's orders having been fully complied with, there no longer existed any mandate or reason preventing the setting for trial of the criminal action of *United States v. Charles W. Hoffritz,* No. 24427-CD.

(8) That, in accordance with your respondent's clear understanding of the mandate of this Court, if this Court considered it within its jurisdiction and desire to further

stay such criminal proceedings, pending the outcome of the civil action on appeal, this Court could and would have readily so stated. That, having not so stated, it was your respondent's understanding that no further injunction existed subsequent to the hearing and disposition had of said civil action.

(9) That, subsequent thereto, your respondent became aware that the Honorable William G. East, a United States District Judge, District of Oregon, was to be assigned by this Court, on a temporary basis, to assume duties and try cases in this District, which assignment was to commence on or about July 1, 1957. That your respondent, being aware of the crowded condition of the calendar of this District Court and knowing there was pending before the Honorable Harry C. Westover, United States District Judge, the criminal action above referred to, communicated with the Honorable Harry C. Westover and asked his permission to call the above-designated criminal case for setting, namely, to a setting date of Monday, May 27, 1957, at 10:00 A.M. That at said time and place and with full consent of the Honorable Harry C. Westover, your respondent did call such said criminal action to be set. The proceedings concerning such setting are more fully reflected in Exhibit "G" of petitioner's motion, namely, on page 32 *et seq.* thereof. Said criminal action was then and there set to be tried commencing July 8, 1957, at 10:00 A.M. and respondent entered an order accordingly and further stated that at the same time and place the matter would be transferred to Judge East.

(10) That with respect to the various paragraphs of the petition on file in the herein action, your respondent does not deem it necessary to particularly answer any of such paragraphs excepting those designated as XII and XIII.

(11) With respect to paragraph XII of said petition, your respondent is merely advised but is not sure that the United States will not be able to proceed to trial in such criminal action if the evidence alleged to have been illegally seized is suppressed and, therefore, makes no further reply thereto.

(12) With respect to paragraph XIII of such petition, your respondent has no way of knowing as to whether or not the United States may or may not be prejudiced by a further stay suspending the criminal action until there has been a disposition of the matter upon appeal in such civil proceedings. Your respondent has observed, from years of experience, that frequently witnesses that would have otherwise been available become unavailable either through death or other causes and it is the respondent's respectful conclusion that any and all unreasonable delays of the criminal action have a real tendency to prejudice the presentation and prosecution of such cases and to seriously hamper the United States Government and the Courts in the proper administration of justice and the criminal laws.

(13) Your respondent in the herein matter, having fully answered in behalf of myself and the District Court for the Southern District of California, Central Division,

and the Judges thereof, pray that said writ of mandamus, injunction, and other appropriate relief, be denied and that we may be hence dismissed.

Dated: This 1st day of July, 1957.

William C. Mathes,
United States District Judge.

I Concur

Harry C. Westover,
United States District Judge.

Laughlin E. Waters,
United States Attorney,

Louis Lee Abbott,
Assistant U. S. Attorney,
Chief, Criminal Division,

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Attorneys for Respondent Court and Judge.

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The Honorable Harry C. Westover and the Honorable William Mathes, Judges of the United States District Court for the Southern District of California, Central Division; and the United States District Court for the Southern District of California, Central Division,

Respondents.

Brief of Respondent Court and Judges to Petition for Writ of Mandamus, Injunction, and Other Appropriate Relief, and for Rule to Show Cause.

ARGUMENT.

I.

The Criminal Trial Should No Longer Be Delayed. Petitioner Has a Plain Speedy and Adequate Remedy to Raise All Constitutional Questions Here Asserted in the Criminal Case.

Petitioner claims that the last paragraph of a recent opinion of this court in this matter precludes the setting and more especially the trial of the criminal income tax case of *United States v. Charles W. Hoffritz,* No. 24427 C. D. that was on May 27, 1957, set for trial to commence July 8, 1957.

We refer to the opinion of this court as reported *Hoffritz v. United States,* 240 F. 2d 109, 113 (C. A. 9, 1956). The language claimed to accomplish this end reads as follows:

> "The judgment is reversed and the cause remanded, with directions to grant appellant a hearing at which he may produce evidence and cross-examine adverse witnesses. An appropriate order shall be entered in the district court enjoining further proceedings in the criminal action until such a hearing has been held in the instant proceedings, and there has been a complete disposition thereof."

A reading of the above opinion clearly reveals that the issue decided by this court was that under the civil complaint petitioner had filed (Civil 17721-WM) this court determined that petitioner was entitled to a hearing at which he could produce evidence and cross examine adverse witnesses.

There is nothing in the mandate or opinion of the Court that attempted to grant to petitioner an indefinite stay of the criminal case, nor to say the trial of such case following such a hearing and through all the steps of an appeal that petitioner might elect to pursue following an adverse ruling such as was here again had.

It is submitted that had this court felt the criminal case should have been further stayed pending appeal from an adverse ruling had in conformity with its direction it could have readily used language expressly so directing. It is seriously doubted if this Court would attempt to so delay a criminal prosecution, especially when the issues of alleged illegal search and seizure contained in the civil complaint (No. 17721-WM) could again be presented in

the criminal case for consideration both by the court and jury and are likewise matters that can be preserved for review on appeal.

To refer to the language, now debated by Petitioner, it is submitted that full compliance has been had with such mandate. A hearing was had, where both sides produced witnesses, exhibits were received in evidence and argument was presented by both parties. This hearing was had on February 14th and 15th of 1957, before United States District Judge William C. Mathes. Attached to this brief and marked Exhibit A is a copy of the "Findings of Fact and Conclusions of Law" together with the "Judgment" of the Court all dated February 27, 1957, in the civil case of *Charles W. Hoffritz v. United States of America, et al.*, No. 17721-WM (Civil).

It is thus clear that ". . . there has been a complete disposition thereof" of the proceedings, the subject of this courts opinion and mandate *i. e.,* 240 F. 2d 109, 113. Surely this court did not intend to prevent the setting and trial of the criminal case, after disposition had been had of the civil action. The indictment in the criminal case had been pending since August 31, 1955.

(a) All Issues Pertaining to Alleged Illegal Seizure Are Subject to Decision, and May Be Renewed in the Criminal Case, and Are Susceptible of Review Upon Appeal.

There is adequate statutory authority for petitioner to fully present and safeguard his Constitutional rights of the asserted illegal search and seizure in the criminal case. "Rule 41 Search and Seizure" and of the same rule *i.e.* "(e) Motion for Return of Property and to Suppress Evidence," of the Federal Rules of Criminal Procedure

provide full and adequate provisions for the safeguard of petitioners Constitutional guarantees in the criminal action. This rule is as follows:

> "41(e) F. R. C. P. *Motion for Return of Property and to Suppress Evidence.* A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Indeed, an inspection of the criminal file *i.e.* United States v. Hoffritz, 24427-CD, will reflect that there is on file, having been filed January 20, 1956 a "Motion for Return of Seized Property and Suppression of Evidence under Rule 41(e) F. R. C. P." together with a supporting affidavit of the defendant Charles W. Hoffritz and a supporting Memorandum. The Plaintiff, the Govern-

ment, caused on January 27, 1956 affidavits to be filed in opposition to such Motion and likewise a Memorandum in opposition thereto. The record of such criminal action further reflects that on February the 20th, 1956 Judge Harry C. Westover conducted a hearing based upon the Motion to suppress and further reflects the courts conclusion in respect thereto as: "Court takes the Motion under submission, to be decided at time of trial."

Before we proceed further it should be observed that no tangible documents or papers were obtained from the petitioner during the period that the Special Agent of the Internal Revenue, Irwin R. Weiss, was examining records of the defendants at defendants' place of business. No property was taken, notes and transcriptions of certain of defendants records were made during such examination.

The cases are numerous in support of the trial court's jurisdiction to suppress evidence illegally seized. Such has been the law, prior to and since the adoption of Rule 41(e) F. R. C. P.

We shall refer to but a few income tax cases to illustrate how broad the rule has been held in determining an issue substantially the same as that urged by Petitioner.

In the case of *Smith v. United States,* 348 U. S. 147, 150, 151 (1954), the court approves the procedure of submitting to the jury the issue as to whether a statement alleged to have been obtained by fraud was in fact obtained through such means.

> "Petitioner contends that his net worth statement should not have been admitted in evidence because it was procured pursuant to an understanding between petitioner and a Government agent that the case would be closed and the petitioner granted immunity.

See Wan v. United States, 266 U. S. 1, 14; Bram v. United States, 168 U. S. 532, 542-543; Wilson v. United States, 162 U. S. 613, 622-623; Sparf and Hansen v. United States, 156 U. S. 51, 55. Petitioner's accountant, who carried on negotiations with this Government agent, testified that the agent had promised to close the case if the net worth statement and a check to cover the tax deficiency were forthcoming, and that he, the accountant, would never have submitted the statement had he not believed that the case would be closed on this basis. The Government agent testified that he was aware of no such understanding and that he had made no promises to close the case. After a pretrial hearing on petitioner's motion to suppress evidence, the trial judge refused to suppress the net worth statement. During the course of the trial, he refused to hold a hearing outside the presence of the jury to determine preliminarily the statement's admissibility. He submitted the issue to the jury with the instruction that they were to reject the statement, and all evidence obtained through it, if 'trickery, fraud, or deceit' were practiced on petitioner or his accountant.

"The issue of fraud or deceit on the part of the Government agent was properly submitted to the jury, and the jury, in arriving at its general verdict, could have found from the conflicting evidence that no fraudulent inducement had been offered petitioner or his accountant. . . ."

An additional late case of the Third Circuit recognizing that the jury is privileged to reject evidence if obtained by deceit of Government Agents, in an income tax case is *United States v. Joseph Frank,* ...... F. 2d ...... (May 15, 1957), 1957 C. C. H. Standard Federal Tax Report, paragraph 9675:

> "Again at the close of the trial the judge charged the jury, at the defendants request, that:
>
> "'Any such evidence, including papers, business books, records, bank records, and cancelled checks, as well as oral and written admissions obtained by (sic) the defendant by fraud, force, persuasion, misrepresentation, trickery, or deceit of the Governments agents, if any should not be considered against this defendant.'"

This principle as involved in another income tax case, where a motion to suppress had been filed is noted in *United States v. Guerrina,* 126 Fed. Supp. 609, 611 (D. C. Pa., 1955). The Court stated as follows:

> "The order heretofore entered on May 5, 1953 will, therefore, be modified to the extent that the evidence procured by the agents of the Internal Revenue Bureau on their first visits and while the defendant was present will not be suppressed. The Government may introduce such evidence at trial, without prejudice however to the right of the defendant at that time to raise for jury determination the question as to whether the disclosures then made were in fact voluntary."

It would thus appear that all lawful rights of the Petitioner can be and are fully safeguarded in the criminal action, and that there is no lawful or just reason for delaying the trial of such criminal case. Petitioner may well be found innocent in such criminal action, in which event an appeal in the civil action would be needless. In the criminal action, petitioner will have the benefit of both the court and jury in passing upon his contentions of illegal search and seizure. If such determinations are adverse to petitioner, his rights are further protected by review by this Court.

II.

The Question Arises in This Case as to Whether the Appeal Has Become Moot by Virtue of the Return of the Indictment on August 31, 1955, and the Subsequent Hearing Conducted by the District Court on February 14th and 15, 1957 by the District Court in Conformity With the Opinion of This Court.

Prior to the return of the indictment herein of August 31, 1955 the District Court entered its order on March 29, 1955, which was heard upon affidavits and not by means of oral testimony, denying Hoffritz's suit or complaint to suppress certain evidence the subject of the Civil Action No. 17721-WM. This decision was reversed by reason of the opinion reflected in 240 F. 2d 109 (Dec. 1956).

The second hearing, had in conformity with this court's opinion was however conducted subsequent to the return of the indictment, as noted it was heard on February the 14th and 15th of 1957. It would thus appear that the contention that no indictment had been returned prior to such hearing is no longer tenable. There surely must be a cessation of dilatory actions that preclude the trial of criminal cases, once the criminal forum is available to there assert contentions available for its determination. This court has said in consideration of somewhat similar injunctive proceedings, *Ackerman v. International Longshoremen's Union*, 187 F. 2d 860, 868 (C. A. 9, 1951) C. D. 342 U. S. 859, page 868:

> ". . . It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong."

See also:

Campbell v. Medalie, 71 F. 2d 671 (C. A. 2, 1934).

An order of a District Court granting or denying a motion to suppress evidence and for the return of property, if made prior to indictment, is a final decision and appealable.

United States v. Rosenwasser, 145 F. 2d 1015 (C. A. 9, 1944);

Freeman v. United States, 160 F. 2d 69 (C. A. 9., 1946);

Weldon v. United States, 196 F. 2d 874 (C. A. 9, 1952).

Nevertheless, the question arises in this case of whether the appeal from Judge Mathes' later judgment of February 27, 1957 has become moot by virtue of the return of the indictment on August 31, 1955. There is little authority on this subject. The First Circuit Court of Appeals discussed the problem in an income tax case of *Centracchio v. Garrity,* 198 F. 2d 382 at pp. 388-389 (C. A. 1, 1952):

> (P. 388) "We have considered somewhat whether the handing down of the indictment on February 21, 1952, rendered this appeal moot. It is a curious situation. The fact that the petition to suppress was filed as an independent proceeding prior to indictment was the only thing that made the district court's order thereon a 'final decision' appealable under 28 U. S. C. §1291. If the motion to suppress had been filed after indictment, for the sole purpose of procuring the exclusion of evidence at a forthcoming trial, an order denying such motion would not have been a 'final decision' but rather an unappealable

> interlocutory order entered in the course of the criminal case. Cogen v. United States, 1929, 278 U. S. 221, 49 S. Ct. 118, 73 L. Ed. 275.[2] But presumably if the order of the district court was a 'final decision' when rendered, it did not lose that characteristic from the fact that an indictment was subsequently handed down. Cf. United States v. Poller, 2 Cir., 1930, 43 F. 2d 911. And though the finding of a true bill by the grand jury defeated one of the objects of petitioner in his motion to suppress, the petition did not thereby become entirely moot, for petitioner still remained interested in the relief sought in so far as it might be directed to the suppression of the evidence at the trial. Probably therefore, as a technical matter, the present appeal should not be dismissed as moot. . . ."

On the other hand, logic and the prompt administration of criminal proceedings, compels the reasonable conclusion that the second appeal has, in fact, become moot. In the *Rosenwasser* case, *supra,* this court discussed the reasoning of the Supreme Court in *Cogen v. United States,* 278 U. S. 221 (1929). In both the *Cogen* and *Rosenwasser* cases, there was an appeal from a district court's order on a motion to suppress evidence and return property made after indictment. Both cases determine that such an order was not appealable. This court observed in the *Rosenwasser* case, *supra,* at page 1017:

> ". . . The Supreme Court emphasized the fact that the suppression of evidence, not the return of the papers, was the principal purpose of defendant's application. . . ."

If this criteria is to be used to determine what is left of appellants second appeal, then such appeal has become moot. While the Complaint includes an action for the

return of property, the record clearly will reveal that in fact no property was taken, transcriptions alone of certain records are all that was obtained, therefore the action in this case is simply one to suppress evidence. Therefore, in line with the reasoning of the *Cogen* and *Rosenwasser* cases, a remedy remains available to the appellant in the district court.

(a) Appellate Courts Should Lend Little if Any Assistance to Pre-indictment Motions or Complaints, That Have as Their Object the Continuance of Criminal Actions, Especially so When Once an Indictment Has Been Returned.

The attitude of the Courts toward preindictments petitions to suppress evidence, and the lack of enthusiasm to be granted such is expressed in the income tax case of *Chieftain Pontiac Corp. v. Julian,* 209 F. 2d 657 at page 659 (C. A. 1, 1954):

> ". . . In our opinion in the Centracchio case, supra, we tried to indicate our general lack of enthusiasm for these petitions to suppress evidence, filed at a preindictment stage. We are not disposed to sanction the use of such a remedy except in obedience to the clear mandate of controlling Supreme Court decisions. The leading cases are cited in our Centracchio opinion . . ."

In the case of *Centracchio v. Garrity,* 198 F. 2d 382 (C. A. 1, 1952), the court reviews the authorities and discusses pre-indictment petitions and their propriety:

> (P. 387),"Judicial interference of this sort with the action of a United States attorney in the administration of the criminal law, at a pre-indictment stage, must, we think, be regarded as the exception rather than the rule. Cf. United States v. Thompson, 1920, 251 U. S. 407, 40 S. Ct. 289, 64 L. Ed. 333. Aside

> from one case, about to be noted, we are unaware of any authorities sanctioning such interference except in the case of unlawful search and seizure."

In this same case the court refers to the case of *In re Fried,* 161 F. 2d 453, wherein is discussed the propriety of the district courts entertaining a pre-indictment petition for the suppression of an alleged coerced confession.

We respectfully invite the court's attention to the discussion of the subject as contained in the *Centracchio* opinion, commencing on page 387. It is submitted that the court there frowns upon the extention of pre-indictment separate petitions to suppress evidence. The Court aptly observes on page 388 of the *Centracchio* opinion that the district court should have dismissed the petition as lacking in equity. This Judge Mathes did in the instant case see paragraph III of the Judgment of February 27, 1957 which concludes: ". . . and the complaint is dismissed for want of equity in favor of the defendants and against the plaintiff." [Ex. A.]

The language of the *Centracchio* case in this particular reads as follows:

> (P. 388) "Our conclusion is that the district court should have dismissed the petition as lacking in equity, which of course would have been without prejudice to the right of petitioner, in the event of indictment, to raise at some appropriate stage, whether before trial or during the trial,[1] the question as to

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[1]*Nardone v. United States* (1939), 308 U. S. 338, 341-342.

the admissibility of the evidence disclosed by him in reliance on the Treasury's announced voluntary disclosure policy."

In an action brought in the Territory of Hawaii seeking to enjoin the prosecution of four criminal proceedings we find this court reversing injunctions there granted by the District Court of the Territory. The situation while not identical to the instant problem is logically relevant in its discussion of enjoining pending criminal proceedings. We quote from:

> *Ackerman v. International Longshoremen's Union,* 187 F. 2d 860 (C. A. 9, 1951) (Rev'g 82 Fed. Supp. 65) C. D. 342 U. S. 859.

> (P. 868) "The rule that equity jurisdiction does not extend to enjoin pending criminal prosecutions, has no exceptions. No extraordinary circumstances will serve to create such jurisdiction.
>
> That equity will stay its hand in respect to criminal proceedings, always when they are pending, and ordinarily when they are threatened, is a rule of wide and general application under our legal system. It is a rule of the state courts in respect to criminal proceedings in the same or other state courts. Milton Dairy Co. v. Great Northern Ry. Co., 124 Minn. 239, 144 N. W. 764, 49 L. R. A., N. S. 951; State ex rel., Kenamore v. Wood, 155 Mo. 425, 56 S. W. 474, 48 L. R. A. 596. Federal courts apply the same rule when asked to enjoin criminal proceedings in the federal courts. Argonaut Mining Co. v. McPike, 9 Cir., 78 F. (2d) 584; Whitehead v. Cheves, 5 Cir., 67 F. (2d) 316; 317, certiorari denied 290 U. S. 704, 54 S. Ct. 371, 78 L. Ed. 605; Campbell v. Medalie, 2 Cir., 71 F. (2d) 671, certiorari denied

293 U. S. 592, 55 S. Ct. 108, 79 L. Ed. 686. It is a principle expressing a sound policy that the processes of the criminal law should be permitted to reach an orderly conclusion in the criminal courts where they belong."

It has been held that a bill in equity will not be to enjoin a criminal prosecution, although plaintiff in the civil suit was a lawyer and might be disbarred upon conviction. The Court held in *Campbell v. Medalie,* 71 F. 2d 671, 672 (C. A. 2, 1934):

(P. 672) ". . . If the indictment be bad or the statute, for any reason suggested by the appellant, be unconstitutional, his remedy at law is still adequate and sufficient. The usual purpose of a suit in equity is the protection of rights of property. An injunction will be granted only where the facts disclose the likelihood of immediate and irreparable damage to property. (Citing cases.)

* * * * * * * *

"The general rule has often been said that a court of equity is without jurisdiction to restrain criminal proceedings . . ."

To similar effect with the attempt to enjoin the enforcing of a state statute:

Douglas v. City of Jeannette, 319 U. S. 157 (1943);

Stefanelli v. Minard, 342 U. S. 117 (1951).

This court has held that equity will not enjoin enforcement of a criminal statute even though it be unconstitutional.

Argonaut Mining Co. v. McPike, 78 F. 2d 584 (C. A. 9, 1935).

For further treatment of the subject of "Restraint of Criminal Prosecutions" see Cyc. of Federal Proc., Vol. 14, page 904, section 73.163.

An express mandate of the Constitution is:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . ."
>
> Const., Amendment VI.

It seems to be but sound policy, in fact it would appear to be the duty of the trial court to accord the accused a *speedy* trial, and such was accorded here, once the district court had conducted the second hearing in the civil action as here noted.

If the position asserted by petitioner is sound there will exist a condition of indeterminable delays and prolonged appeals, with the strong probability that witnesses will be unavailable or evidence not producible, a situation that, it is respectfully submitted, this court should not sanction under the cloak of an equitable writ.

Attached to petitioner's motion is a copy of the Civil Complaint filed in action No. 17721-WM, named as a defendant in this Complaint is the "United States of America." Unless this civil action is to be considered solely as a Motion to Suppress pursuant to Rule 41(e) of F. R. C. P. it would appear that no consent has been given by the United States to be sued. This proposition, so far as it effected property rights has been the subject of a recent determination by this Court, wherein it was

held that the Federal Government cannot be sued without its consent.

> *United States v. Finn,* 239 F. 2d 679, 682 (C. A. 9, 1956).

A suit to restrain a United States Attorney from instituting criminal proceedings under a statute of the United States is manifestly a suit against the United States. *Jacob Hoffman Brewing Co. v. McElligott,* 259 Fed. 525 (C. C. A. 2, 1919). Even more clearly, a suit to restrain a United States Attorney from prosecuting a criminal action already commenced is a suit against the United States. No consent to such an injunction action has been given.

Cases citing in approval of the above *Jacob Hoffman* case. See also:

> *Moyer v. Brownell,* 137 Fed. Supp. 594, 597 (see footnote No. 4) (D. C. Pa., 1956);
>
> *Board of Trade of Kansas City v. Milligan,* 90 F. 2d 855, at p. 861 (C. C. A. 8, 1937);
>
> *Rebhun, et al. v. Cahill, U. S. Attorney,* 31 Fed. Supp. 47, at p. 48 (D. C. N. Y., 1939);
>
> *P. E. Harris & Co. v. O'Malley, et al.,* 2 F. 2d 810, 812 (C. C. A. 9, 1924).

Conclusion.

For all of the foregoing reasons it is respectfully submitted that writ sought by the herein petition be denied, and that the order of this Court granting leave to file said Petition for writ of mandamus, injunction and other appropriate relief, and Order to Show Cause be vacated and set aside, and that the rule or order to show cause be discharged.

Respectfully submitted,

Laughlin E. Waters,
United States Attorney,

Louis Lee Abbott,
Assistant U. S. Attorney,
Chief, Criminal Division,

Norman W. Neukom,
Assistant U. S. Attorney,
Chief, Trial Attorney,

Attorneys for Respondent Court and Judges Thereof.

EXHIBIT "A."

United States District Court, Southern District of California, Central Division.

Charles W. Hoffritz, Plaintiff, v. United States of America, Laughlin E. Waters, United States Attorney, and Irwin R. Weiss, Defendants. No. 17721-WM (Civil).

Findings of Fact and Conclusions of Law.

The above-entitled matter having come on for trial on the 14th and 15th days of February, 1957, before the Honorable William C. Mathes, United States District Judge, the plaintiff represented by his counsel, Bernard B. Laven, and the defendants represented by their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Max F. Deutz and Norman W. Neukom, Assistant United States Attorneys for said district, and the Court having heard and received evidence, among which was the sworn testimony of Special Agent Irwin R. Weiss and that of the plaintiff, Charles W. Hoffritz, and written briefs having been filed and oral argument having been presented on behalf of both plaintiff and the defendants, and the Court being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact.

I.

That the action is a plenary civil suit in equity originating by a Complaint filed by the plaintiff seeking a Temporary Restraining Order and Injunction to suppress evidence; and is likewise found to be in the nature of Motions for the return of property and to suppress evidence pursuant to Rule 41(e) of the Federal Rules of Criminal

Procedure. That such action invokes the jurisdiction of this Court's disciplinary power over its officers upon the allegations contained in plaintiff's Complaint.

II.

That at all times mentioned in plaintiff's Complaint, Irwin R. Weiss is and was a Special Agent of the Intelligence Division, Internal Revenue Service, United States Treasury Department.

III.

That on April 14, 1953, Special Agent Weiss called at the office of the plaintiff, Charles W. Hoffritz, doing business as Glo-Dial Clock Company, 922 West 23rd Street, Los Angeles, California, and returned there from time to time up to and including May 1, 1953.

IV.

That on April 14, 1953, Special Agent Weiss advised plaintiff that he was investigating plaintiff's income tax liabilities, and made no attempt to hide his official identity or purpose of his business, but, to the contrary, did show to plaintiff his Special Agent's credentials. That plaintiff read such credentials and understood them, and knew and understood what Agent Weiss was, before he ever consented to Agent Weiss spending some ten days or two weeks in examining the books and records of plaintiff.

V.

That plaintiff, on April 14, 1953, gave Special Agent Weiss permission to examine his books and records, and plaintiff imposed no limitation on his consent, and that Special Agent Weiss did thereafter inspect said books and records.

VI.

That plaintiff's consent given to Special Agent Weiss to examine plaintiff's books and records was voluntarily and understandingly given, and with full appreciation of the possible consequences, and was not revoked, and continued to be voluntarily and understandingly given during the period of examination of said books and records by Special Agent Weiss. That Special Agent Weiss did not employ either fraud, deceit, trickery or device in securing the voluntary consent of plaintiff to examine his books and records.

From the foregoing Findings of Fact, the Court makes the following Conclusions of law:

Conclusions of Law.

I.

That the action commenced by plaintiff's Complaint is either a plenary suit in equity for injunctive relief and an order suppressing certain evidence and for the return thereof, or, in the alternative, is a motion for the return of property and to suppress evidence, pursuant to Rule 41(e) of the Federal Rules of Criminal Procedure, and is heard, tried and considered on both of such theories, either of which support the ultimate holding of this Court.

II.

That the action or motion upon either theory, arises out of this Court's inherent power to discipline an officer of the Court and is equitable in nature, and seeks equitable relief and for that reason a trial by jury has heretofore been denied and is now denied, and the allegations of the complaint shall be tried by the Court without a jury.

III.

That the failure of Special Agent Weiss to warn plaintiff of his right under the United States Constitution, Amendment V, not to be a witness against himself, does not render plaintiff's consent to examine his books and records involuntary.

IV.

That the failure of Special Agent Weiss to advise plaintiff that a criminal investigation was pending was not a stratagem amounting to an unlawful search and seizure within the meaning of the United States Constitution, Amendment IV. Nor did such failure constitute either fraud, deceit, trickery or device by such Agent to the plaintiff.

V.

That plaintiff, as a reasonable man, is held to understand that when he gave permission to inspect his books and records to an investigator charged with enforcing the law, and placed no limitations on such permission, he permits the inspector for all purposes relevant to the inquiry, including evidence of willful tax evasion.

VI.

The plaintiff's right to be free from unlawful searches and seizures under the United States Constitution, Amendment V, was not violated.

VII.

That plaintiff was not involuntarily compelled to be a witness against himself.

VIII.

That plaintiff's consent to examine his books and records was voluntarily and understandingly made, was not revoked, and continued to be voluntary during the

entire period of investigation of said books and records by Special Agent Weiss.

Let Judgment Be Entered Accordingly.

Dated at Los Angeles, California, this 27th day of February, 1957.

W. M. Mathes,
United States District Judge.

United States District Court, Southern District of California, Central Division.

Charles W. Hoffritz, Plaintiff, v. United States of America, Laughlin E. Waters, United States Attorney, and Irwin R. Weiss, Defendants. No. 17721-WM (Civil).

Judgment.

The above-entitled matter having come on for trial on the 14th and 15th days of February, 1957, before the Honorable William C. Mathes, United States District Judge, the plaintiff, represented by his counsel, Bernard B. Laven, and the defendants, represented by their counsel, Laughlin E. Waters, United States Attorney for the Southern District of California, and Max F. Deutz and Norman W. Neukom, Assistant United States Attorneys for said district, and the Court having heard and received evidence, among which was the sworn testimony of Special Agent Irwin R. Weiss and that of the plaintiff, Charles W. Hoffritz, written briefs having been filed and oral argument having been presented on behalf of both plaintiff and the defendants, the Court, being fully satisfied in the premises, makes its Findings of Fact and Conclusions of Law.

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed:

I.

That the order to show cause issued January 4, 1955, should be, and hereby is, discharged.

II.

That the defendant's motion to strike demand for jury filed January 17, 1955, and renewed on January 27, 1957, should be, and hereby is, granted.

III.

That plaintiff's complaint and motion for a temporary restraining order and injunction, and for the suppression of evidence and the return of property and for a temporary and permanent injunction, should be and is hereby denied, and all other relief prayed for by the complaint in this action is denied, and the complaint is dismissed for want of equity in favor of the defendants and against the plaintiff.

Dated at Los Angeles, California, this 27th day of February, 1957.

W. M. Mathes,
United States District Judge.